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Supreme Court, U.S.

F I L E D

No. 94-8769

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IN THE

CLERK

Supreme Court of the United States

OCTOBER TERM, 1995

TOMMY L. RUTLEDGE,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE SEVENTH CIRCUIT

REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR PETITIONER

ARGUMENT

In its brief, the Government does not come to terms with the interrelation between this Court's decisions in *Jeffers v. United States* and *Garrett v. United States* on the one hand, and *Ball v. United States* on the other. Instead, the Government focuses on the unique procedural posture of *Jeffers* — the fact that the defendant created his own double jeopardy problems by insisting upon multiple prosecutions — while ignoring the fact that the *Jeffers* Court recognized a multiple punishments issue that *Jeffers* and the Government both had overlooked. The Court deemed this Fifth Amendment issue important enough to address nevertheless, and framed the "critical inquiry" as "whether Congress intended to punish each statutory violation separately." *Jeffers v. United States*, 432 U.S. 137, 154-55 (1977). The Court's answer is negative: the reduction of the criminal fine that this Court ordered in *Jeffers*

followed directly from its specific conclusion that "Congress did not intend to impose cumulative penalties under §§ 846 and 848" in cases where the same criminal agreement supported the separate charges under those two statutes. *Id.* at 157.

Bounded by the holding in *Jeffers*, which was noted with approval in *Garrett v. United States*, 471 U.S. 773, 794 (1985), the Government seeks to put a fine point on Congress's intent: acknowledging that Congress did not authorize pyramiding punishments under §§ 848 and 846, which Congress could have done under *Missouri v. Hunter*, 459 U.S. 359 (1983), the Government contends that Congress did intend to authorize multiple convictions with concurrent sentences. The Government's reading of Congressional intent is highly unlikely — if Congress really saw these as separate and distinct offenses meriting separate and distinct convictions and punishments it likely would have authorized pyramiding their sentences — and the Government offers no clear expression of this unlikely intent from Congress.

Moreover, *Ball*, which was decided earlier in the same term as *Garrett*, bars the entry of multiple judgments of conviction, as well as the imposition of concurrent sentences, in cases where Congress did not intend the same conduct to be punished under two statutes: "the second conviction, even if it results in no greater sentence, is an impermissible punishment." *Ball v. United States*, 470 U.S. 856, 865 (1985). Applying *Ball*'s holding concerning judgments of conviction to the findings of *Jeffers* and *Garrett* concerning Congressional intent leads to the conclusion, adopted by a significant majority of the courts of appeals (see Pet. Br. 17-18), that the Double Jeopardy Clause forbids even the entry of separate judgments under both §§ 846 and 848 when both charges are based on the same scheme.

The Government seeks to circumvent this analysis by arguing that the unique relationship between another pair of statutes at issue in *Ball* generated the conclusion that Congress did not intend to allow multiple judgments of conviction for the same conduct, and

that no such conclusion is warranted here with respect to 28 U.S.C. §§ 846 and 848. (See U.S. Br. 17-24). However, as shown below, there are no material differences between the two sets of statutes to support the Government's speculative distinctions concerning Congressional intent. This Court has concluded that Congress did not intend cumulative punishment with respect to either the weapons statutes in *Ball* or the statutes in the case at bar. In both situations the mere entry of judgment of conviction operates as a punishment. Nowhere in its argument does the Government offer a good reason why this Court should ignore the impermissibly cumulative and punitive effect of a second judgment of conviction in combined CCE and conspiracy prosecutions.^{1/}

I. ENTRY OF SEPARATE JUDGMENTS OF CONVICTION ON CCE AND CONSPIRACY VERDICTS BASED ON THE SAME CONDUCT VIOLATES THE FIFTH AMENDMENT.

A. Under *Ball*, Judgments Of Conviction And Concurrent Sentences Are Punishments For Purposes Of Applying The Holding In *Jeffers* And *Garrett* That Congress Did Not Intend Cumulative Punishment Under 21 U.S.C. §§ 846 and 848.

The Government does not dispute that, under *Jeffers* and *Garrett*, Rutledge cannot receive greater punishment as a result of

^{1/} The Government's formulation of the "Question Presented" (U.S. Br. I) suggests that the issue in this case is whether the Double Jeopardy Clause requires that the conspiracy judgment specifically be vacated in light of the CCE judgment. Rutledge respectfully suggests that the constitutional proscription of cumulative punishment not intended by the legislature is remedied so long as either one of the two judgments and the sentence thereunder is vacated. (See Pet. Br. i.) The decision as to which of the cumulative judgments and sentences should be vacated (or, in the ordinary course, not entered in the first place) belongs in the first instance to the sentencing court. See *Ball*, 470 U.S. at 864 (remedy for unconstitutionally cumulative judgments "is for the District Court, where the sentencing responsibility resides, to exercise its discretion to vacate one of the underlying convictions").

the separate guilty verdicts for violating §§ 846 and 848 than he could receive under one of those statutes, where the verdicts are based on the same conduct. (See U.S. Br. 15, 17.) That point conceded, the Government cannot limit the question of whether Rutledge's two convictions and sentences on the CCE and conspiracy charges have resulted in an impermissible greater punishment to an inquiry into whether his total prison term and fine exceed the parameters established by one statute or the other. Since each separate judgment of conviction and concurrent sentence amount to punishment, as *Ball* held, the entry of multiple judgments of conviction with concurrent sentences imposed on Rutledge resulted in a punishment that could not have been imposed under only one of the statutes. Because each judgment of conviction is in its own right a separate punishment, even if the corresponding sentences are concurrent, Rutledge has been subject to the very accumulation or "pyramiding" of criminal sanctions that the Government concedes the Fifth Amendment prohibits (see U.S. Br. 15), given the undisputed conclusion that Congress did not intend the CCE and conspiracy statutes to impose cumulative punishment for the same conduct. *Jeffers*, 432 U.S. at 157; *Garrett*, 471 U.S. at 795.²

In arguing that Rutledge's constitutional claims are governed exclusively by the intent of the legislature, the Government misses the point that the question of whether judgments of conviction and

concurrent sentences are punishments is not itself a simple question of legislative intent. In *Ball*, this Court emphasized that "'punishment' must be the equivalent of a criminal conviction and not simply the imposition of sentence." *Ball*, 470 U.S. at 861.

Decisions of this Court subsequent to *Ball* highlight the constitutional, rather than legislative, nature of what constitutes punishment for purposes of the Double Jeopardy Clause. *United States v. Halper*, 490 U.S. 435 (1989), held that the legislatively-drawn line between "civil" and "criminal" proceedings did not serve as a boundary for the Double Jeopardy Clause. *Id.* at 446-49. Instead, the question whether a sanction "constitutes punishment in the relevant [i.e., Fifth Amendment] sense requires a particularized assessment of the penalty imposed and the purposes that the penalty may fairly be said to serve." *Id.* at 448. Hence, a sanction "that cannot fairly be said solely to serve a remedial purpose, but rather can only be explained as also serving either retributive or deterrent purposes, is punishment, as we have come to understand the term." *Id.* See also *Department of Revenue of Montana v. Kurth Ranch*, 114 S. Ct. 1937, 1945 (1994) (legislative characterization is not dispositive on question of whether sanction is "punitive in character"); *id.* at 1950 (Rehnquist, C.J., dissenting) ("The Court asks the right question, . . . , but reaches the wrong conclusion"); *id.* at 1953 (O'Connor, J., dissenting) (". . . a tax imposed on the possession of illegal drugs is subject to double jeopardy analysis").

² The Government is correct in noting that, contrary to the statement in Rutledge's opening brief, this Court was not unanimous in *Jeffers* in concluding that Congress did not intend to impose cumulative punishment under the two statutes. (See Pet. Br. 10; U.S. Br. 13 n.7.) Justice White opined that the statutes in *Jeffers* involved separate offenses for purposes of the Double Jeopardy Clause under *Iannelli v. United States*, 420 U.S. 770 (1975), and that cumulative punishment consequently would be permissible under the conspiracy and CCE statutes. *Jeffers*, 432 U.S. at 158 (White, J., concurring in part and dissenting in part). Nevertheless, eight justices concluded in *Jeffers* that such cumulative punishment was forbidden under the multiple punishments protection of the Double Jeopardy Clause, and this Court (including Justice White) expressly approved that conclusion eight years later in *Garrett*.

With the guidance of *Halper*, it cannot be gainsaid that the separate and additional conviction and concurrent sentence constitute separate and additional punishment. Visiting the second conviction and sentence on Rutledge for the same conduct as the first plainly is "retributive." *Halper*, 490 U.S. at 448. Each additional conviction, and each additional sentence, even without extending the length of a sentence, exacts additional retribution. If this were not so, the Government would not fight so hard to preserve them. The ability to report to the press that a defendant is guilty of not one but two serious drug offenses, that he has received not one but two life

sentences, is the ability to subject the defendant to additional public scorn — the very same "societal stigma" that *Ball* mentioned. 470 U.S. at 865.

Therefore, while there may be no Fifth Amendment limits on Congress's power to provide for cumulative punishment in a single proceeding, *Missouri v. Hunter*, 459 U.S. 359, 365-68 (1983), the question of how to implement Congress's intent, as discerned in *Jeffers*, not to punish the same conduct under both the CCE and conspiracy statutes requires a judicial answer. *Ball* supplies that answer, by holding that the additional judgment of conviction and its concurrent sentence are additional punishment. 470 U.S. at 865.

The categorical approach of *Ball* also saves sentencing courts from having to determine whether the additional judgment and sentence may have a significant collateral consequence at some unknown point in the distant future — a task that is particularly impossible where, as here, the projected sentence is life imprisonment. (See Pet. Br. 13-16.) Indeed, for all its attempts to intimate that the additional judgment and sentence make no difference to Rutledge, the Government does not and could not contend that they will never matter.^{3/} The Government notes that under current law the additional judgment will not affect a parole decision because there is no federal parole at this time. (See U.S. Br. 22 n.11.) But no one can guarantee that parole will not be reintroduced during Rutledge's lifetime, and in a fashion where the additional judgment and sentence would defeat his eligibility. No one can guarantee that the additional judgment and sentence will not play an adverse role in determining whether Rutledge will be granted a compassionate release later in life. See Pet. Br. 16 (discussing trend towards early and compassionate release for older prisoners); Violent Crime

Control Act of 1994, Pub. L. No. 103-322, Title VII, § 70002, 108 Stat. 1984 (1994) (amending 18 U.S.C. § 3582(c)) (authorizing release of a federal prisoner who is at least 70 years old and has served at least 30 years of his sentence, if not inconsistent with Sentencing Commission policy statements). And certainly no one can guarantee that Rutledge will suffer no additional stigma from an additional conviction and life sentence, since the general public is likely to believe that an additional life sentence reflects a separate heinous crime, rather than pure prosecutorial "piling-on."^{4/} The considerations that led this Court in *Ball* to conclude that judgments of conviction and concurrent sentences are "punishment" apply with equal force here; and that conclusion requires that the district court be directed to vacate one of Rutledge's CCE and conspiracy convictions.

^{3/} For example, the Government argues that "the threat of adverse consequences for the defendant is much less here than in *Ball*!" (U.S. Br. 22), not that the threat of adverse consequences does not exist. Similarly, the Government asserts that is "doubtful" (U.S. Br. 24), not impossible, that a defendant convicted of CCE will suffer an incremental stigma from the conspiracy conviction.

^{4/} Furthermore, as Rutledge specifically argued in his opening brief, the cumulative judgments already have resulted in an impermissible cumulative penalty under 18 U.S.C. § 3013, which requires separate \$50 assessments for each charge on which the sentencing court enters judgment. (See Pet. Br. 3, 16.) The government is incorrect to suggest that the question presented in Rutledge's petition and brief presupposes full concurrence of the sentence. (U.S. Br. 7 n.1.) An additional judgment of conviction *automatically* leads to an additional assessment under 18 U.S.C. § 3013. Likewise, *vacatur* of one of the judgments will as a matter of course result in a correspondingly reduced assessment. Consequently, the question of the validity of the cumulative assessment is at issue here as "a subsidiary question fairly included" in the question presented, which expressly challenges the cumulative judgments of conviction on the separate CCE and conspiracy counts. U.S. S. Ct. R. 14.1(a). There was no need for Rutledge to focus extensively on the additional \$50 assessment because the Government has never contended in this case that appellate review is barred by the concurrent sentences doctrine. See U.S. Br. 7 n.1, 27 n.13 ("the concurrent sentences doctrine now has virtually no application in the federal system"), *citing Ray v. United States*, 481 U.S. 736 (1986) (per curiam).

B. The Government's Reading Of Congressional Intent Ignores This Court's Prior Determination In *Jeffers* That Congress Did Not Intend To Allow Cumulative Punishment Under 28 U.S.C. §§ 846 and 848.

The parties agree that the question whether the entry of judgment on convictions for both the CCE and conspiracy counts of the indictment against Rutledge violated the Double Jeopardy Clause involves an analysis of whether Congress intended to allow punishments for both offenses. (See Pet. Br. 8; U.S. Br. 4.) In *Jeffers*, this Court considered and decided this very question. Declaring that the "critical inquiry" on the multiple punishments issue was "whether Congress intended to allow cumulative punishment for violations of §§ 846 and 848," this Court unambiguously stated, "We have concluded that it did not. . . ." *Jeffers*, 432 U.S. at 155. The Court based this conclusion on a thorough analysis of the structure, policy, and legislative history of the statutes. *Id.* at 156-57.

Notwithstanding this Court's clear holding to the contrary, the Government argues that Congress must have intended to allow dual convictions and concurrent sentences for violations of both statutes based on the same agreement. To avoid the *Jeffers* holding, the Government argues that this Court's discussion of Congress's intent not to allow "cumulative punishment" merely referred to extending the length of incarceration or increasing the amount of the fine. (U.S. Br. 15.) To support this overly narrow view of *Jeffers*, the Government states that the end result in *Jeffers* was that the Court left intact the defendant's multiple convictions and concurrent sentences, and simply reduced the total fines so that they would not exceed the maximum provided under both statutes. From this, the Government argues that if this Court really meant that Congress had not "intended to punish each statutory violation separately," 432 U.S. at 155, it would have vacated one of the convictions.

The Government's argument fails for two reasons. *First*, this Court had not yet addressed the question whether two separate

convictions and concurrent sentences for the same conduct constitute separate punishment for purposes of the Double Jeopardy Clause. This Court did not address the issue until *Ball*, eight years after *Jeffers*. It is the combination of this Court's finding in *Jeffers* that Congress did not intend "cumulative punishment" and its holding in *Ball* that an additional conviction and concurrent sentence constitutes cumulative punishment which establishes that Rutledge's constitutional rights have been violated.

Second, the procedural history and the arguments presented to this Court in *Jeffers*, and not a narrow view of the double jeopardy protection, led to the limited nature of the relief granted in that case. *Jeffers* had insisted on being tried separately on the conspiracy and CCE counts; he demanded multiple prosecutions and got them by objecting to the Government's request for a single trial. As a consequence, his conspiracy conviction had been affirmed and the certiorari petition therefrom denied, 423 U.S. 1066 (1976), even before the court of appeals had ruled on the appeal from his CCE conviction, 532 F.2d 1101 (7th Cir. 1976). With only the CCE life sentence before it, there was little the Court could have done, even if it had been properly alerted to the issue raised by the concurrent sentences.⁵ But in addition, *Jeffers* failed to alert the Court to the constitutional issue raised by the concurrent sentences. To the contrary, *Jeffers* informed the Court "that this is not a case of multiple punishments but a case of multiple prosecutions." Brief for Petitioner at 21, *Jeffers v. United States*, 432 U.S. 137 (1977) (No. 75-1805). Because *Jeffers* never raised this issue, later to be addressed in *Ball*, the Court simply dismissed the question of the

⁵ Because it had tried to avoid the problem by seeking a single trial for all counts, vacating the CCE conviction with its lengthier sentence would not have been fair to the Government. If the conspiracy conviction had been before the Court at the same time, it could have vacated the 15-year prison sentence for that conviction entirely and still left *Jeffers* with the life sentence on the CCE conviction. With only the life term before it, though, the Court could not take the same approach it had used with respect to the fines and reduce his life sentence to "life minus fifteen years."

concurrent prison terms without analysis in a footnote. 432 U.S. at 155 n.24.

Given the Government's willingness to assume that §§ 848 and 846 here define the "same offense" for purposes of *Blockburger v. United States*, 284 U.S. 299 (1932), an assumption that is well-founded,⁶ the Government's brief is remarkable for the absence of any reference to a "clear indication" by Congress of an intent to permit multiple convictions and sentencing for CCE and conspiracy convictions. See *Whalen v. United States* 445 U.S. 684, 691-92 (1980). Instead of any clear statement of Congressional intent, the Government offers supposition and conjecture regarding why it is "appropriate to presume" (U.S. Br. 17) that Congress intended to allow multiple punishments under §§ 848 and 846. But the fact that

§ 848 adds to the "agreement" element it shares with § 846 an element requiring proof of the commission of substantive drug offenses is not a clear indication that Congress intended to authorize concurrent (but only concurrent) sentences for CCE and conspiracy (U.S. Br. 16). And while the Government is correct that the CCE offense is more serious than a so-called "simple" drug conspiracy (U.S. Br. 16-17), Congress provided for the added seriousness of the CCE offense by including stiffer sentences in § 848. If anything, the serious nature of CCE might have prompted Congress to authorize the pyramiding of sentences — which it clearly knows how to do. See, e.g., 18 U.S.C. § 924(c)(1). But the Government concedes that Congress did not take that approach, and is left with the unlikely position that Congress intended on the one hand to permit dual convictions for CCE and conspiracy but on the other to prohibit courts from using those dual convictions as a basis for imposing lengthier prison terms or greater fines.

In the end, the Government resorts to arcane speculation, suggesting that Congress might have intended § 846 to operate as a sort of backup conviction in the event that a § 848 conviction was ever overturned for failure to prove beyond a reasonable doubt one of the elements that distinguishes § 848 from § 846. (U.S. Br. 20-21.) But the Government cannot establish that Congress ever gave a thought to this issue when it enacted the CCE statute, or that it has ever intentionally created any other similar "backup" offenses.

The fact remains that in *Jeffers* this Court asked "whether Congress intended to punish each statutory violation separately" and, after conducting an analysis that the Government does not challenge, "concluded that it did not." 432 U.S. at 155. This is definitive as to Congressional intent.

⁶ Were it necessary actually to resolve the "same offense" question, the result would be the same because conspiracy is in fact a lesser included offense of CCE. Conspiracy and CCE are the "same offense" under the *Blockburger* test because there is no element in the conspiracy offense that is not also an element of the CCE offense. "Every minute" that a defendant was committing a CCE violation, "he was simultaneously committing both the lesser included [offense] and the greater felony." See *Garrett*, 471 U.S. at 789 (discussing *Brown v. Ohio*, 432 U.S. 161 (1977)). The Government's position to the contrary, to which it still adheres in theory (see U.S. Br. 11-12 n.5), depends on the implausible contention that a group of people act "in concert" even though one or more of those people is unaware of the underlying scheme or purpose of the action. That interpretation of the CCE statute defies the plain meaning of "concerted action." See, e.g., *Black's Law Dictionary* 289 (6th ed. 1986) (defining "concerted action" as "Action that has been planned, arranged, adjusted, agreed on and settled between parties acting together pursuant to some design or scheme"); 1 *Webster's Third New International Dictionary* 470 (1986) (defining "concerted" as "mutually contrived or planned: agreed on"); 1 *New Shorter Oxford English Dictionary* 467 (1990) (defining "concert" as "Agreement in a plan or design; accordance, harmony"). This Court has already noted that "[s]ince the word 'concert' commonly signifies agreement of two or more persons in a common plan or enterprise, a clearly articulated statement from Congress to the contrary would be necessary before that meaning should be abandoned." *Jeffers*, 432 U.S. at 149 n.14. As the Government acknowledges, in recent years the courts of appeals have rejected unanimously the argument that conspiracy is not a lesser included offense in single agreement cases such as this one. (See U.S. Br. 12 n.5.)

C. The Structure And History Of The CCE And Conspiracy Statutes Cannot Distinguish *Ball*'s Holding That Judgments Of Conviction And Concurrent Sentences Are Cumulative Punishment Forbidden By The Fifth Amendment.

Jeffers and *Ball* mirror each other in their reasons for determining that Congress did not intend to punish the same conduct twice under the respective pairs of statutes at issue in those cases. The conclusion in *Jeffers* that Congress did not intend multiple punishments under the CCE and conspiracy statutes followed from the fact that both statutes were addressed to "the additional dangers posed by concerted activity." *Jeffers*, 432 U.S. at 157 (Opinion of Blackmun, J.); *see also Garrett*, 471 U.S. at 794 (approving *Jeffers* because "the dangers posed by a conspiracy and a CCE were similar"). Likewise, in *Ball*, the Court found that Congress did not intend cumulative punishments under the gun receipt and possession statutes at issue there because "[t]he independent but overlapping statutes simply are not 'directed to separate evils'." *Ball*, 470 U.S. at 864 (quoting *Albernaz v. United States*, 450 U.S. 333, 343 (1981)). The Government therefore faces a heavy burden in arguing that Congress intended to allow multiple judgments and concurrent sentences with respect to 21 U.S.C. §§ 846 and 848, even though Congress did not intend to allow such a result with respect to 18 U.S.C. §§ 922(h) and 1202(a). There is no direct evidence for this contention in the statutory language, the legislative history, or elsewhere. Moreover, none of the arguments that the Government offers as to the respective sets of statutes justifies the Government's attempt to impute diametrically opposed intentions to Congress with respect to the two sets of statutes.

The Government argues that the relevant drug statutes are different from the gun statutes on structural grounds (U.S. Br. 16-17), and suggests that because "Congress intended to create a distinct statutory offense when it created the CCE statute" it is "appropriate to presume that Congress intended to permit dual convictions with concurrent sentences for violation of the drug

conspiracy statute and the CCE offense." (U.S. Br. 17.) That is no distinction at all because 18 U.S.C. §§ 922(h) and 1202(a) are equally distinct offenses. In fact, this Court in *Ball* held that Congress did not intend to impose multiple judgments and concurrent sentences when possession of a gun was incidental to its receipt even though this Court recognized that "each substantive statute, in conjunction with its own sentencing provision, operates independently of the other." *Ball*, 470 U.S. at 860 (quoting *United States v. Batchelder*, 442 U.S. 114, 118 (1979)). The independence of the two statutes can justify the prosecution of both counts and the return of multiple guilty verdicts, but not the entry of dual judgments of conviction and the imposition of concurrent sentences.

Nor does the degree of overlap between 18 U.S.C. §§ 922(h) and 1202(a) provide any meaningful distinction between *Jeffers* and *Ball*. (See U.S. Br. 19-20). The overlap between those statutes is not as complete as the Government suggests. At least one other factual situation, which occurs far more often than a defendant manufacturing a gun (see U.S. Br. 19), will expose the defendant to conviction under § 1202(a) (possession) but not under § 922(h) (receipt): any time a person receives a gun before being convicted of a felony, and continues to possess the same gun after being convicted of a felony. Moreover, as Chief Justice Burger observed in *Ball*, §§ 922(h) and 1202(a) each apply to "substantial groups of people not covered by the other." 470 U.S. at 863, n.13. By comparison, the CCE-conspiracy overlap in this case is complete. "Every moment of [Rutledge's] conduct was as relevant to the [conspiracy] charge as it was to the [CCE] charge." *Garrett*, 471 U.S. at 787.⁷

⁷ The Government's contention that the manner in which Congress enacted § 1202(a) also does not distinguish *Ball* from *Jeffers*. (See U.S. Br. 20.) That the possession statute was passed pursuant to a late and supplemental Senate amendment simply is not the basis on which this Court in *Ball* concluded that multiple convictions and sentences are not permitted under the possession and (continued...)

Furthermore, the "practical concerns" over direct or collateral attack supposed by the Government do not justify treating judgments of conviction and concurrent sentences as not intended in the *Ball* situation but intended in the *Jeffers* situation. (See U.S. Br. 20-22.) The Government fails to show that there is, in fact, a high rate of success in direct or collateral attacks on CCE convictions. This is hardly surprising, since showing a high reversal rate in CCE cases would suggest that too often prosecutors are either charging too aggressively or prosecuting these cases in an improper manner. In fact, many challenges are not successful, and of those that are, only successful challenges to the sufficiency of the evidence are likely to lead to outright reversals of CCE convictions; others will lead to retrials. See Section II, below. The Government's "practical concerns," therefore, are largely illusory; ultimately, judicious use of the serious CCE charge by prosecutors is the best protection for the problems of which the Government complains.

Moreover, since a CCE conviction requires proof of a substantive drug offense in addition to the special CCE elements that completely subsume a conspiracy offense, *vacatur* of the CCE conviction will leave intact the conviction and sentence for the substantive offense, to which the Government is entitled under *Garrett*, 471 U.S. at 795, without violating the Double Jeopardy Clause. There is, therefore, no threat of a felon going free in any event.

Finally, the Government understates the degree to which it is possible to prevail in a challenge of a receipt conviction under § 922(h) while failing to prevail on a similar challenge to a possession conviction under § 1202(a), or vice versa. The success

of the one challenge may well imply the success of the other in cases where the alleged error is based on the evidence admitted at trial. Even there, however, evidence of receipt while a felon could be improperly admitted, thus requiring *vacatur* of a receipt conviction, even though the evidence of possession while a felon was perfectly sound. In addition, the viability of a purely legal challenge to one of the two gun-related convictions — based, for example, on jury instructions, irregularities in the indictment, or the like — simply does not imply that there are viable grounds for overturning the other gun-related conviction. The difference, if there is any, in the prospects for successful direct or collateral attack in the *Ball* context and the *Jeffers* context cannot justify the differing readings of Congressional intent that the Government proposes.

In sum, there is no basis for concluding that the scope of impermissible cumulative punishment was intended to be any different as to 21 U.S.C. §§ 846 and 848 than it was as to 18 U.S.C. §§ 922(h) and 1202(a). *Ball* held that the Double Jeopardy Clause prohibits multiple convictions and concurrent sentences with respect to the latter offenses. That conclusion equally is compelled here given the determination in *Jeffers* that Congress did not intend cumulative punishment for the same conduct under the conspiracy and CCE statutes. Accordingly, this case should be remanded to the district court with directions to vacate Rutledge's judgment of conviction for either the conspiracy or the CCE offense and the corresponding sentence.

II. A COMBINED CONVICTION AND SENTENCE ON THE CCE AND CONSPIRACY COUNTS WOULD ALSO VIOLATE THE FIFTH AMENDMENT.

The Government suggests in the alternative that this Court follow the Second Circuit's approach of entering a combined judgment on both the conspiracy and the CCE convictions with a single sentence for both. See U.S. Br. 24-26, citing *United States v. Aiello*, 771 F.2d 621, 632-35 (2d Cir. 1985). The Second

^{2/} (...continued)

receipt statutes. That conclusion proceeded from the determination that the two statutes defined the same offense and were directed to the same problem. *Ball*, 470 U.S. at 860-62. Likewise, in *Jeffers* and *Garrett*, this Court concluded that the CCE and conspiracy statutes both are directed to the additional dangers posed by concerted activity. *Jeffers*, 432 U.S. at 157; *Garrett*, 471 U.S. at 759.

Circuit's technique impermissibly results in the entry of judgment of conviction on both the CCE and the conspiracy counts, notwithstanding that court's attempt to circumvent the problem by labeling the district court's action as entering a "single" sentence on judgments that have been "combined." The fictional combined judgment does nothing to vitiate the Double Jeopardy Clause violation inherent in the act of entering judgment on both of the cumulative verdicts. If the judgment of conviction reflects conviction for both the CCE and the conspiracy offenses, it does not matter (except, perhaps, as to the number of assessments under 18 U.S.C. § 3013) whether those convictions are recorded on a single line as part of one count, or on two lines as two separate counts. There is in any event only a single document recording the judgment in a criminal case, which reflects all the charges on which a judgment of conviction has been entered. Fed. R. Crim. P. 32(b)(1). In violation of the Double Jeopardy Clause, the Second Circuit permits the recording by criminal judgment of multiple convictions on both the conspiracy and the CCE offense.

The Government's professed concern with the consequences of appeal and collateral attack lack merit, first because the Government assigns costs of, and responsibility for, error to the wrong party, and second, because these consequences are not nearly as severe as the Government urges. A successful appeal or collateral attack usually means that the Government, through no fault of the defendant, has erred in its prosecution, or that the trial court, through no fault of the defendant, has erred in its conduct of the trial, or both, and that the error is sufficiently severe and harmful to upset the conviction. The defendant is not the source of those errors, and should not be the one to be burdened by them. Surely defendants cannot be made to purchase, with a portion of their Fifth Amendment rights, insurance for the Government against its own errors.

Contrary to the Government's contention, a successful appeal or collateral challenge does not mean that the defendant will "escape

without conviction or punishment." (U.S. Br. 30.) The law is settled that, with very limited exceptions, the Government has the power to retry the defendant after a successful appeal or collateral attack. *United States v. Ball*, 163 U.S. 662, 671-72 (1896) (direct appeal); *United States v. Tateo*, 377 U.S. 463, 466 (1964) (collateral attack). The primary exception to this rule permitting retrial is a ruling that the Government failed to establish guilt beyond a reasonable doubt; it should surprise no one that retrial is not permitted in that circumstance. *Burks v. United States*, 437 U.S. 1, 16-18 (1978).⁴ The Government deserves no more protection from its own errors than is provided by its right to seek a new conviction after a meritorious appeal or collateral challenge.

Finally, the Government also suggests, albeit with little enthusiasm, the possibility of staying the entry of judgment and sentence on one of the cumulative counts, and allowing judgment and sentence to be entered if the defendant ever prevails in a challenge to the conviction and sentence actually entered. (See U.S. Br. 26-29.) In its present posture, this case does not raise the question of whether the cumulative judgment and sentence could be stayed for entry later if a challenge to the judgment that was entered proves successful.

Moreover, the Government has not demonstrated that there exists in practice any real problem with respect to challenges to CCE convictions. The Government has not cited a single case in which a CCE conviction was overturned for insufficient evidence

⁴ Even in the circumstance that a subsequent challenge to a CCE conviction has established that the Government failed to prove beyond a reasonable doubt some element that CCE does not share with conspiracy, so that an accompanying conspiracy conviction would have survived, there is authority for the proposition that the Government could retry its conspiracy charge if necessary. See *Beverly v. Jones*, 854 F.2d 412 (11th Cir. 1988) (holding that Alabama could retry defendant on lesser included charge of first degree murder where conviction on greater charge of murder while committing robbery was reversed for failure to prove the robbery element beyond a reasonable doubt), *cert. denied*, 490 U.S. 1082 (1989).

on an element unique to CCE. Our research has revealed very few, and none in which serious problems arose. In *United States v. Ward*, 37 F.3d 243, 251 (6th Cir. 1994), *cert. denied*, 115 S. Ct. 1388 (1995), upon reversal of the CCE conviction the defendant acquiesced in the reinstatement of the guilty verdict on the conspiracy charge, which had been vacated rather than entered by the district court. *United States v. Witek*, 61 F.3d 819, 825 & n.8 (11th Cir. 1995), and *United States v. Delgado*, 4 F.3d 780, 782 (9th Cir. 1993), do not disclose the manner in which the district courts addressed the dual guilty verdicts, but CCE reversals were accompanied by affirmances of conspiracy convictions. See also *United States v. Silvers*, 888 F. Supp. 1289, 1305-09 (D. Md. 1995) (describing the "combined" conviction as a "legal legerdemain" but holding that a vacated conspiracy sentence can be reinstated if the CCE conviction is overturned).

Under *Jeffers* and *Ball*, the Double Jeopardy Clause bars any approach that involves entering judgments and sentences on §§ 848 and 846 guilty verdicts that rest on the same conduct, either outright or in some "combined" or "alternative conditional" form. Beyond those limitations, Rutledge suggests that this Court permit the lower courts to address the propriety and effects of other alternatives as cases with this issue present themselves. Those courts will then have cases that put the matter at issue and the benefit of full briefing and argument. With the benefit of experience, the lower courts may come to agreement on a proper approach; if not, the additional experience will assist this Court in resolving the split below.

CONCLUSION

For the foregoing reasons, and those set forth in his opening brief, petitioner Tommy L. Rutledge respectfully requests that this Court reverse the judgment of the United States Court of Appeals for the Seventh Circuit and remand with an order that the district court vacate his conviction and sentence under either Count 1 or Count 2 of the indictment.

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